In the Supreme Court of the United States

OCTOBER TERM, 1949

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

COTTON VALLEY OPERATORS COMMITTEE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

Appellee, Magnolia Petroleum Company, has moved to dismiss the appeal upon the ground that the judgment of the district court dismissing the action is not a "final" judgment within the meaning of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869, 989, 15 U. S. C., Supp. II, 29.

I

THE JUDGMENT DISMISSING THE ACTION IS A FINAL JUDGMENT

The first ground of appellee's motion is that the judgment is not final because it did not adjudicate

the merits of the controversy. We submit that *United States* v. *Wallace & Tiernan Co.*, 336 U. S. 793, conclusively establishes that a judgment not determining the merits is a final judgment if, as in the present case, it bars further prosecution of the particular proceeding. In *Wallace & Tiernan* the district court's judgment did not adjudicate the merits; it dismissed "without prejudice" a civil proceeding under the Sherman Act, upon the ground of want of prosecution. On appeal under the Expediting Act, this Court overruled appellees' motion to dismiss the appeal. It said (note 1, p. 795): "That the dismissal was without prejudice to filing another suit does not make the cause unappealable, for denial of relief and dismissal of the case ended this suit so far as the District Court was concerned." See also *United States* v. *National City Lines*, 334 U. S. 573, 577; *Bowles* v. *Beatrice Creamery Co.*, 146 F. 2d 774 (C. A. 10).

Appellee further suggests that the district court's judgment is not final because it resulted from the plaintiff's failure to comply with an order for the production of certain documents. But the finality of a judgment is determined by its effect, not by the reasons which led to its entry. In *Wecker* v. *National Enameling & Stamping Co.*, 204 U. S. 176, the federal trial court denied plaintiff's motion to remand the cause to the state court, whereupon the plaintiff refused to proceed with his case and the court entered judgment dismissing the action. This Court, on review of such judgment, noted that the

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plaintiff might have obtained a trial on the merits if he had been willing to recognize the jurisdiction of the federal court, but held that the judgment of dismissal was a "final judgment" in that it "terminated the action." 204 U. S. at pp. 181-182.

II

THE JUDGMENT OF DISMISSAL DISPOSED OF ALL CLAIMS WITHIN THE JURISDICTION OF THE DISTRICT COURT

The second ground of the motion to dismiss is that the district court's judgment did not dispose of a prayer for declaratory judgment, entitled "Thirty-second Defense," incorporated in appellee's answer to the complaint. The prayer was for a judgment declaring that the contract and operations of the CVOC are valid and not in violation of the federal antitrust laws. The relief thus requested was an adjudication against the United States as to the legality of certain conduct.

It is elementary that the United States may not be sued without its consent. The Sherman Act is a penal and regulatory statute and confers no right to obtain an adjudication as against the United States of what the law does or does not prohibit. Accordingly, unless some other statute or special legal principle authorized the declaratory relief sought by the appellee, the district court plainly was without jurisdiction to grant it.

The Declaratory Judgment Act, Title 28, United States Code, Sections 2201-2202, does not purport to waive sovereign immunity and the Act has been

expressly held not to grant the privilege of obtaining a declaratory judgment against the United States. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682. In that case suit was brought against a federal officer to obtain injunctive relief and a declaration of the rights asserted by the plaintiff. This Court held that the suit was, in substance, a suit against the United States and that it therefore had properly been dismissed for want of jurisdiction. The Court principally considered whether the injunctive relief sought was such as to make the suit one against the sovereign, but it held (n. 9, p. 689) that the prayer for declaratory relief was "even more clearly directed at the sovereign." The Court said (*ibid.*), "Such a declaration of the rights of the respondent [plaintiff] *vis-à-vis* the United States would clearly have been beyond the court's jurisdiction."

For other decisions holding that the Declaratory Judgment Act is not a waiver of the federal government's immunity from suit, see *Yeskel* v. *United States*, 31 F. Supp. 956, 958 (D.N.J.); *Twin Cities Properties, Inc.* v. *United States*, 81 Ct. Cl. 655, 658.[1]

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[1] State declaratory judgment statutes likewise have been held not to authorize suit against a state official to declare the rights of the petitioner against the state. *Bell Telephone Co.* v. *Lewis*, 313 Pa. 374 (1934); *International Mutoscope Reel Co.* v. *Valentine*, 247 App. Div. 130 (1936), affirmed *per curiam* 271 N.Y. 622. In the *Bell Telephone* case the court said (p. 375):

> We think it never was contemplated in enacting the legislation authorizing declaratory judgments that there

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The Government's immunity from suit, absent statutory waiver thereof, embraces claims asserted against it by way of cross claim or counter-claim. *United States* v. *Shaw*, 309 U. S. 495; *United States* v. *U. S. Fidelity & Guaranty Co.*, 309 U. S. 506. A court has no jurisdiction to adjudicate such a claim even though the United States fails to assert its immunity and, if the court does act on the claim, its judgment is void and subject to collateral attack. *U. S. Fidelity & Guaranty* case, at pp. 513-515.

We submit that the judgment of dismissal entered in the instant case disposed of the only claims over which the district court had jurisdiction, namely, the charges of violation of the Sherman Act made in the complaint filed by the United States, and that the judgment of dismissal clearly was, therefore, a final and appealable judgment.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1949.

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might be an order, judgment or decree against the State without its consent. To hold otherwise would be to subject the Commonwealth to all sorts of meddlesome, ill-founded litigation.

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